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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, MOULDING-BROWNELL CORPORATION AND E. HELDMAIER, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE

SUPREME COURT OF ILLINOIS

No. 24531

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Appellees.

STATEMENT BY APPELLEES OPPOSING JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

Now come Illinois Commerce Commission, Moulding-Brownell Corporation, E. Heldmaier, Inc., a corporation, Commonwealth Edison Company, a corporation, and The Peoples Gas Light and Coke Company, a corporation, appellees herein, and present this statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

I.

Statement of Facts.

Appellant, by its petition to the Illinois Commerce Commission (R. 232), sought an order of the Commission determining that the industries served by a certain switch track (referred to by the Commission in its order as a

"spur track") in the City of Chicago should pay all future costs of maintaining it and all license and other fees assessed under ordinance for its occupancy of public streets and alleys; and that in default of such payments appellant be authorized to discontinue the rendering of service over the track (R. 239). After a hearing, the Commission entered an order (R. 6) denying appellant authority to abandon the track and denying it authority to discontinue the rendering of railroad transportation service by means thereof; also specifically ordering appellant to continue the maintenance and operation of the track and the rendering of railroad transportation service by means thereof (R. 30).

That order was affirmed by the Circuit Court of Cook County, Illinois (R. 758), and the judgment of the Circuit Court was affirmed by the Supreme Court of Illinois.

As stated in the opinion of the Supreme Court of Illinois, the findings of fact made by the Illinois Commerce Commission in its order have not been disputed by any of the parties.

The Illinois Commerce Commission found, in substance, that for many years the petitioner has been rendering rail service to various industries by operation over the spur track in question; that a portion of said track was originally constructed about 1866 or 1868, at grade, upon property belonging to others than appellant, and crossed various public streets and alleys; that since then various extensions of said track have been constructed in accordance with contracts under which all or most of the cost of such extensions has been paid and borne by one or another of the industries served by said track (R. 10); that pursuant to a track elevation ordinance passed by the City Council of the City of Chicago in 1903, a portion of said track was elevated and the cost of elevation was paid by The Peoples Gas Light and Coke Company, one of the industries served by means of the track, and by Commonwealth Electric Company, the

owner of a part of the lands on which the track was laid; that from 1904 up to the present time, appellant and its predecessors in interest have maintained, renewed, replaced and repaired the track, although since 1923 appellant and its predecessors in interest have endeavored to induce the industries served by means of the track to pay the cost of its maintenance, renewal, replacement and repair, and the license fees charged by the City of Chicago for the privilege of maintaining the track across streets and alleys (R. 11-12).

The track in question is a spur track or lead track, which is, and at least since 1885 has been, connected with the main track of the railroad now owned by appellant (R. 25), and it extends thence across five streets and certain alleys in the City of Chicago (R. 25), a distance of 2831 feet (R. 29), being more than one-half of a mile.

The industries now being served over the spur track are Moulding-Brownell Corporation, E. Heldmaier, Inc., and The Peoples Gas Light and Coke Company which furnishes gas to the City of Chicago and its inhabitants. Each of those industries is furnished railroad transportation service by means of industrial spur tracks, which branch off the spur track in question, except that a gas manufacturing plant of the Gas Company is furnished railroad transportation service by means of an extension of said spur track. The industrial spur tracks which branch off from the lead spur track in question and the extension which furnishes service to the gas manufacturing plant are not in controversy in this case, as the cost and expense of their maintenance, repair and renewal have always been borne by the industries served thereby (R. 28).

The spur track in question was constructed by or at the cost and expense of owners of land on which the track is laid, and not at the cost or expense of appellant or any of its predecessors in interest, and, except at its connection with the main track of appellant's railroad and for a dis-

tance of 150 feet therefrom, the spur track was constructed, and is now located, on lands not owned by appellant (R. 25).

In 1904 a portion of said spur track was elevated, in compliance with an ordinance of the City of Chicago, and The Peoples Gas Light and Coke Company and the Commonwealth Electric Company paid the cost of elevation (R. 26).

Appellant has other spur tracks (known as lead tracks) in Illinois of the same length of the spur track in question, with spurs leading off therefrom and serving industries, but the lead track in each instance, which serves the same purpose as the spur track in question, is on appellant's property and appellant owns and maintains those lead tracks (R. 29).

Appellant did not contend before the Commission that public convenience and necessity no longer requires the operation of the spur track, nor did it contend that the operation over the track has resulted or will result in any loss to it. On the contrary, the evidence showed that the track is indispensable to the operation of the plants of the Gas Company and the plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., and that the traffic handled over the track in 1934 by appellant amounted to about $40,000.00 (R. 17-18). It appears that the average "running repair" on the track has cost about $1,000.00 per year, although the total outlay will be greater than that sum during the next few years, due to necessary replacements (Opinion of Illinois Supreme Court).

The Commission found that under the law of Illinois, as established by numerous decisions of the Supreme Court of Illinois, a railroad switch track, side track or spur track constructed in whole or in part on or across public streets or highways and connected with the main line of a railroad becomes a part of that railroad, and therefore a public highway in the sense that term is used in the Constitution of Illinois, whether constructed by the Company owning or

operating such main line of railroad or by the owner of an industry served by such switch track, side track or spur track or at the joint expense of the railroad company and such owner; that its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service; and that it would therefore seem most inequitable and unjust to require the industries served by the existing industrial spur tracks to pay the cost of maintaining and keeping in repair the lead spur track in question (R. 18-19).

In brief, the sole contention of appellant before the Commission and in the State courts has been that it is not required to maintain the track in question because it does not own the track or the land on which the track is laid, even though it has the exclusive use of the track, pays no rental therefor, charges the owners the same rates charged other members of the public for railroad transportation over the track, and sustains no financial loss by reason of its operation over the track after paying the cost of maintenance and repairs. Its position is that it is entitled to all the benefits but cannot be required to assume the burdens attendant upon the use of the track in furnishing railroad transportation service to the public, and that an order requiring it to assume those burdens deprives it of its property without due process of law.

Appellant's claim that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Illinois rests upon its mere statement, made in the State Courts, but unsupported by any cases or argument, that the order of the Illinois Commerce Commission constitutes a taking of appellant's property without due process of law.

Appellees contend that appellant's claim is so frivolous and devoid of merit, and so contrary to the established law

as settled by the decisions of the Supreme Court of the United States, that it is not reviewable by the Supreme Court of the United States.

II.

If appellant had the right, under the Fourteenth Amendment, to abandon service over the track in question unless the industries served thereby paid the cost of its maintenance and repair (which is the real basis for its appeal to the Supreme Court of the United States), it was not necessary for it to obtain authority from the Illinois Commerce Commission to abandon the track. However, it considered such authority necessary and voluntarily petitioned the Commission for authority to abandon service over the track. By its petition, it necessarily recognized the power and jurisdiction of the Commission either to grant or refuse the prayer of its petition. The order of the Commission requiring it to maintain the track was a necessary consequence of the refusal of the Commission to authorize appellant to abandon service over the track unless the industries paid the cost of maintenance and repair. Having voluntarily submitted itself to the jurisdiction of the Illinois Commerce Commission on the question of authority to abandon service over the track, appellant is estopped to deny the power of the Commission to enter an order in the exercise of the very jurisdiction which appellant invoked.

McDonald v. *Oregon Navigation Company*, 233 U. S. 665 (670).

Appellant therefore has no right to change its position at this time and prosecute an appeal to the Supreme Court of the United States on the ground that the order of the Illinois Commerce Commission deprives it of property without due process of law, in violation of the Fourteenth Amendment.

III.

Under the law of Illinois, a switch track, side track or spur track constructed on or across public streets or highways and connected with the main line of a railroad, is a part of such railroad and is subjected to use for the public.

St. Louis, Springfield and Peoria Railroad v. *Commerce Commission*, 309 Ill. 621.

The previous decisions of the Supreme Court of Illinois are reviewed in the case above cited, and in the subsequent case of *von Oven* v. *Chicago, Burlington and Quincy Railroad Company*, 317 Ill. 334, the court said (pp. 342-3):

> "This court has held that switch-tracks built for industrial connections with railroads, whether built at the expense of the railroad or the owners of the industry, or at the joint expense of both, become, in legal contemplation, tracks of the railroad with which they are connected, open to public use and subject to public regulations."

The Supreme Court of the United States in *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission*, 249 U. S. 422 at 424, followed the decisions of the Supreme Court of Illinois establishing the law of Illinois as above set forth.

The spur track in question is, therefore, under Illinois law, a part of appellant's railroad, open to public use, and subject to public regulations. The contention that an order of the Illinois Commerce Commission requiring appellant to operate and maintain such a track deprives appellant of property without due process of law is so frivolous and devoid of merit that the Supreme Court of the United States should not entertain an appeal from a judgment of the Supreme Court of Illinois affirming such order.

IV.

Appellant, having the possession and exclusive use of the track in question, is under the legal obligation to maintain the track and keep it in repair.

Gridley v. *City of Bloomington*, 68 Ill. 47 (51);
City of Peoria v. *Simpson*, 110 Ill. 244 (299-300);
Tomle v. *Hampton*, 129 Ill. 379 (383);
Boyce v. *Tallerman*, 183 Ill. 115 (122);
West Chicago Masonic Association v. *Cohn*, 192 Ill. 210 (218);
Sunasack v. *Morey*, 196 Ill. 569 (571);
51 Corpus Juris, p. 760;
Williamson v. *Phillipoff*, 66 Fla. 549, 64 So. 269;
German-American Bank of Seattle v. *Normile*, 82 Wash. 368, 144 Pac. 289;
Bennett v. *O'Brien*, 37 Ill. 250.

The claim, that an order requiring one to perform an obligation imposed upon him by the common law deprives him of property without due process of law in violation of the Fourteenth Amendment, is so frivolous and devoid of merit that the Supreme Court of the United States should not entertain an appeal from a judgment affirming such order.

V.

The question attempted to be presented by appellant's appeal is foreclosed by previous decisions of the Supreme Court of the United States, as follows:

Union Lime Company v. *Chicago and Northwestern Railway Company*, 233 U. S. 211;
Lake Erie & Western Railroad Company v. *State Public Utilities Commission of Illinois*, 249 U. S. 422;
Chicago & Northwestern Railway Company v. *Ochs*, 249 U. S. 416;
Western & Atlantic v. *Public Service Commission*, 267 U. S. 493, 496.

VI.

The cases cited in Paragraph 6 of appellant's statement in support of jurisdiction, with the exception of *Lake Erie & Western Railroad Co.* v. *State Public Utilities Commission, supra,* involve either the validity of provisions of state statutes fixing penalties for failure to comply with the decisions and orders of state regulatory bodies or the question of whether the rates fixed by the state regulatory bodies under the evidence in the respective cases were so unreasonable as to amount to confiscation of the property of the complaining parties. No such issues are involved in this cause.

VII.

The foregoing shows that any question under the Fourteenth Amendment is foreclosed by previous decisions of the Supreme Court of the United States, and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss, filed herewith.

Respectfully submitted,

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THE PEOPLES GAS LIGHT AND COKE COMPANY,
By COOKE, SULLIVAN & RICKS,
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MOULDING-BROWNELL CORPORATION,
By CLARENCE B. CARDY, *Its Attorney.*
E. HELDMAIER, INC.,
By CLARENCE B. CARDY, *Its Attorney.*
COMMONWEALTH EDISON COMPANY,
By ISHAM, LINCOLN & BEALE,
Its Attorneys.

IN THE

SUPREME COURT OF ILLINOIS

No. 24531

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Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Appellees.

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Now come Illinois Commerce Commission, Moulding-Brownell Corporation, E. Heldmaier, Inc., a corporation; Commonwealth Edison Company, a corporation, and The Peoples Gas Light and Coke Company, a corporation, appellees herein, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question; and they further move, if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of the State of Illinois on the ground that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in

the statement of grounds making against the jurisdiction of this Court filed herewith.

ILLINOIS COMMERCE COMMISSION,
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